DATE ISSUED: SEP 13 l991

CASE NO. 91-TLC-9

In the Matter of :

MT. CLIFTON FRUIT COMPANY
Employer

v.

U .S . DEPARTMENT OF LABOR
Respondent

Appearances:

Roy W. Ferguson, Jr., Esq,
For the Employer

Yvonne Sening, Esq.
For the Respondent

BEFORE:

ROBERT M. GLENNON
Administrative Law Judge

DECISION AND ORDER

This matter arises from a request for a hearing to review the decision of the Regional Administrator, Employment and Training Administration, U. S. Department of Labor, concerning the application of Mt. Clifton Fruit Company for a certification to allow employing alien workers for temporary agricultural work.

This review of the decision of the Regional Administrator is governed by the regulations set forth at 20 CFR 655.112(b). The regulations generally governing the labor certification process for employing alien workers in temporary agricultural jobs are set forth at 20 CFR 655.90, and following. A formal hearing on the issues presented in this case was conducted by telephone conference call on August 30, 1991.

Statement of the Case

By an application filed June 18, 1991, Mt. Clifton Fruit Company seeks certification for hiring 19 alien temporary workers to harvest apples between September 3 and November 1, 1991. (AF-26) Following submission of certain amendments (AF-15), its application was accepted for consideration by the Regional Administrator (RA) on June 28, 1991. (AF-26) As pertinent here, the amended application provided that the temporary workers would be paid at piece-work wage rates of 46 cents per box for "processing apples" and 46 cents per box, plus a 2 cents per box end-of-year bonus, for "fresh market apples". Those wage rates were considered to be the "prevailing" wage rates at the time the application was filed. (AF-10)

On July 26, 1991; however., the RA issued a decision letter to the Employer, Mt. Clifton Fruit Company, stating that the requested labor certification would not be granted unless Employer increased its piece-work wage rates to 50 cents per box for "processing apples" and 47 cents per box, plus a 3 cents per box end-of-year bonus for "fresh market apples." (AF-4)

In his July 26 decision letter, the RA stated that the increased wage rates now being required were based upon wage surveys of the 1990 harvest season that had been accepted by the "National Office" of the U. S. Department of Labor. The earlier 46-cents-per-box level of wages had been based on wage surveys conducted in 1989, and had been used for the 1990 harvest season. The RA stated that, at the time the Mt. .Clifton application was filed in June 1991, no final decision had been made by the National Office for the 1991 harvest season. The RA explained:

> It was the expectation of this office that the National Office would find that the 1990 surveys were flawed and therefore the determination for the 1991 season would be based on the last valid surveys (1989). The prevailing wages would then be the same as in the 1990 harvest year. Based on this assumption, we advised you to submit your application with the $0.46 plus $0.02 E0S bonus per box for fresh market and $0.46 per box for processing as your wage offer. (AF-10)

By a telegram dated August 2, 1991, Mt. Clifton appealed that July 26 decision of the RA,. requesting, a de novo hearing pursuant to 20 CFR 655.112.

The Factual Background

Mt. Clifton Fruit Company is a Virginia partnership engaged in growing and harvesting apples on 325 acres of orchards in Shenandoah County, Virginia. Each year it employs individuals on a temporary basis to harvest the apples in its orchards. During the years 1983 through 1989, its apple harvest ranged from a high volume of 248,000 bushels in 1985 to 133,320 bushels in 1989. The average production over those years was 177,000 bushels. In 1990 its apple production dropped to 105,687 bushels. Over those years, its piece-work wage rates for temporary apple pickers ranged between 41 cents per box in 1983 to 46 cents per box in 1989,

for picking "processing apples;" and, for "fresh market apples," from 43 cents per box in 1983, 41 cents per box in 1984 and 1985, to 55 cents per box in 1989.

Data obtained by Mt. Clifton from the Virginia employment service agency showed that the official "prevailing wage rates" for picking apples in the Winchester area, where its orchards are located, increased from 38 cents per box in 1983 to 40 cents in 1984 and 1985, to 45 cents in 1987, 1988, and 1989, and to 46 cents in 1990. The same rates applied to picking fresh market apples, except that a 2 cents per box bonus applied in 1989 and 1990. (Respondent Exhibit 2)

Gordon D.. Bowman II is the managing partner of Mt. Clifton Fruit Company. He has been involved in the apple industry for 35 years. His company basically grows and harvests the "processing apples," those apples picked for delivery to processing plants for canning or juice production. TR-25 Although his company did not pay any end-of-season bonuses between 1983 and 1990, he described those bonuses as something a grower would pay a picker who stays at that work for the entire season. Concerning the differential in wage rates for workers picking the two types of apples, Mr. Bowman stated that he does not recall his company or any other growers ever paying more for picking processing apples than for picking fresh market apples.

Mr. Bowman described the 1990 apple harvest as a very poor one. There had been three freezes in the spring, destroying about 50 percent of apple blossoms in the region. The result was a crop about half the prior year's production. As a consequence, he stated,

> We had to pay much more than we normally would because of the apples being scattered and not as many on each tree. A worker had to work a lot harder to make a liveable wage with 50 percent of a crop. So we had to pay a lot higher than we ever have, higher wages that we ever have paid.

Mr. Bowman anticipates a better production in 1991, probably more than twice the 1990 harvest. He believes that the prevailing wage determination now being imposed for the 1991 season "would set a precedent that would be very wrong in the future" by forcing payment of higher wages for picking processing apples than for picking fresh market apples. TR-29

Steven Stefanko is a manpower development specialist in the DOL's regional office in Philadelphia which has jurisdiction over requests for alien labor certifications in DOL's Region III, which includes Virginia. He gave testimony describing the routine procedures by which alien labor certification requests are reviewed. (TR-46) Among other things, that process is used to ensure that employers who hire alien workers for temporary agricultural jobs will pay wages at prescribed minimum levels. The regulations require that an employer hiring alien workers for such jobs will pay them at least at levels "below which similarly employed U. S. workers would be adversely affected". See 20 CFR 655.90, AF-13.

When the Region III office issued the July 26, 1991 decision letter to Mt. Clifton Fruit Company mandating the 50- cents-per-box piece rate for alien workers in the 1991 harvest season, it was following a directive issued by its Washington headquarters office. At the same time it issued the July 26 decision to Mt. Clifton, the Region III office also issued the same order

to 25 other apple growers in the Winchester area. Mr. Stefanko testified that all of the other growers in the Winchester area modified their alien job orders to include the new 50-cents-per-box piece work wage rate. (TR-58)

The Washington office directive to the Region III regional office regarding use of the 50-cent level of wages was given in a telegram to the regional administrator from the national administrator, dated July 15, 1991. (AF-15) That telegram specifies a series of "prevailing wage determinations" for apple harvesting in various regions of Maryland, Virginia, West Virginia, and Pennsylvania. The Winchester area is included. The telegram states that the determinations are based on agricultural survey reports generated by the various State employment service agencies. The national administrator's telegram includes the following discussion:

> In your [the Region III administrator's] memo of May 9 on the Winchester f-resh market apple harvesting survey, you expressed the same concern you noted in 1990 that the prevailing wage survey results were flawed because the largest user of U.S. workers declined to participate in the survey. Our position on this issue is unchanged from last year. Without the voluntary cooperation of Moore and Dorsey, the only viable alternative is to accept the results of the completed survey. The survey was conducted in accordance with the estab1ishe.d. procedures in ETA Handbook No. 385; including acceptable sample size. While we continue to sympathize with your views on this, we have determined that disregarding the survey by pursuing either of the alternative courses of action described in your memo would constitute an insupportable departure from prescribed ETA policy and procedure....

The Winchester area survey referred to was included in a report of the Virginia Employment Commission, dated February 12, 1991 (AF-43), which states in part:

> . . . The reports represent a cooperative effort between the Virginia Employment Commission's Economic Information Services and Job Services Divisions with assistance from the Virginia Cooperative Extension Service of Virginia Polytechnic Institute and State University.
>
> The surveys were conducted in accordance with guidelines provided in ETA Handbook No. 385. The survey area conform to the old wage reporting areas in use in previous years...

The specific survey report for picking "processing apples" in the Winchester area, AF-49, indicates that 45 employers, with 443 foreign workers and 262 U.S. workers, were surveyed between October 9 and 11, 1990. The observed piece-work rates are shown for the U.S. workers in Item 4 of the report form (AR-49). Item l(a) of that form shows as the "prevailing wage rate finding" for the U.S. workers the rate of 50 cents per box. That 50 cents per box rate is a simple calculation drawn from the Item 4 data, in accordance with the so-called "40 percent rule" provided in ETA Handbook No. 385. (AF-69) A similar calculation is presented for the "fresh market" apples in the Winchester area. (AF-50)

As pointed out by Mt. Clifton, however, the Virginia survey reports also contain the following additional comments:

> The wage rate paid for processing is normally below the wage rate paid for fresh market. However, in 1990 this situation was reversed with the processing rate being higher than the fresh market rate. A combination of factors contributed to this situation. The 1990 crop was generally poor in terms of both yield and quality. Because of the small harvest, growers had to pay higher wages on the front side to attract workers. Workers knew that they would not be employed long enough to benefit from year-end bonuses....
>
> Most growers viewed 1990 as simply a break-even year. I n general, the same growers participated in both the 1989 and 1990 surveys.

Discussion and Conclusions

I conclude that the July 17, 1991 determination of the Regional Administrator should be affirmed.

It is not disputed that the Regional Administrator has regulatory authority to order a prospective employer of alien temporary farm laborers to modify the job offer, to increase the offered wage rate as in this case, before a labor certification is granted. See 20 CFR 655.105(c), which specifically authorizes the RA to require the employer's wage offer to reflect the pertinent minimum wages and benefits described in 20 CFR 655.102. Stated otherwise, the regulations require Mt. Clifton to offer wages to aliens that are not less than the prevailing wages paid similarly employed U. S. workers in the area. (AF-13)

In the present case, Mt. Clifton contends that the prevailing wage rate ordered by the Regional Administrator was not correctly determined. It argues that, in determining that rate for application to the 1991 harvest, the DOL failed to take into consideration the adverse weather conditions affecting the 1990 harvest, the sizes of the crops obtained, or the comparable wage rates for prior years in the Winchester area. Mt. Clifton particularly refers to the Virginia survey comments as showing that the wages, the harvest, and financial yields of the apple growers in the area were aberrational in 1990. It also points out that the average annual increase in the prevailing wage rates for picking processing apples prior to this season's harvest have been in the range of 2.6% annually, compared with a 9% increase being imposed for the 1991 harvest.

Mt. Clifton also argues that the wage rates for picking processing apples should not be higher than the rates for picking fresh market apples. Finally, it argues that the timing of the decision to impose the higher, 50-cent level wage rates, coming in mid-July, was not fair to the growers, by not providing them opportunity to anticipate financial prospects for the coming harvest season.

The central point of Mt. Clifton's appeal in this case is that the prevailing wage determination applied by the RA was not correctly determined. It is true, as Mt. Clifton argues,

that the DOL's acceptance of the Virginia commission's survey wage rates does not seem to reflect consideration of the abnormal crop conditions evident in the notes to the survey itself. But I conclude that the decision to accept those wage rates as indicating prevailing wages is a. general po1icy matter within broad administrative discretion of the DOL. That DOL decision involved application of economic policy affecting all similarly situated apple growers in the region, not just the petitioner here. Whether it was a wise economic policy decision, or a sound statistical analysis, to use the 1990 survey data, even if the "largest" employer in the area did not participate, or even if the-season's crop was very poor, is an issue beyond the framework of this adjudicatory process. I do not believe that the appellate review process provided in these regulations was designed or intended to provide a decisive forum for review of the type of general economic policy making presented here.

Here, Mt. Clifton was treated no differently from all the. other apple growers in the Winchester area who were seeking alien workers for harvesting. All the factors Mt. Clifton points to the sharp increase in 1991 wage rates compared with prior years; the lateness of the decision itself; the changed relation between wage rates for picking processing apples and those for picking fresh market apples; and so on -- do tend to support its argument, but this forum is not appropriate for resolution of that argument.

From all that appears on this record, the Mt. Clifton application was processed correctly and fairly, consistently the governing regulations. I conclude, therefore, that the appeal of the decision of the Regional Administrator should not be sustained.

ORDER

The determination of the Regional Administrator, dated July 26, 1991, is affirmed.

ROBERT M. GLENNON
Administrative Law Judge

Washington, D. C.